

STATE OF MONTANA  
BEFORE THE DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION

IN THE MATTER OF APPLICATION FOR  
BENEFICIAL WATER USE PERMIT 6576-s76H  
BY MARTIN G. AND RANNEY H. MOSS

FILMED  
APR 5 1990

FINDINGS OF FACT, CONCLUSIONS OF  
LAW, AND ORDER

The Proposed Findings of Fact, Conclusions of Law, and Order in this matter as entered on July 23, 1976, by the Hearing Examiner, are hereby adopted as the Final Findings of Fact, Conclusions of Law, and the Final Order.

FINAL ORDER

1. Subject to the conditions cited below, the Permittee's Provisional Permit No. 6576-s76H is hereby granted allowing for the appropriation of no more than 2.5 acre-feet of water per annum from Buckhouse (Hayes) Creek, a tributary of the Bitterroot River, at a point in the N $\frac{1}{2}$  NE $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 10, Township 12 North, Range 20 West, M.P.M., in Missoula County, Montana, to be used for irrigation of a lawn and filling a proposed swimming pool from April 1 to October 31, inclusive, of each year, except that the filling of the proposed swimming pool shall be completed by June 1 of each year.

2. The Provisional Permit is granted subject to all prior water rights in the source of supply. The Permittee may not divert water when there is not sufficient supply to satisfy existing rights.

3. The issuing of a Provisional Permit by the Department in no way reduces the Permittee's liability for damage caused by the Permittee's exercise of its Provisional Permit, nor does the Department, in issuing a Provisional Permit, in any way acknowledge liability for damage caused by the Permittee's exercise of its Provisional Permit.

4. This Provisional Permit is granted subject to any final determination of prior existing water rights in the source of supply as provided for by Montana law.

Recommendation

The Department recommends that all parties in this matter properly install and maintain adequate measuring devices to fit their particular individual situation, and keep a log of records of water used for their own proof of their water rights and protection.

Done this 26<sup>th</sup> day of August, 1976.

*Orin Ferris*  
Administrator, Water Resources Division  
DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION

CASE # 6576

BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

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IN THE MATTER OF THE APPLICATION )  
FOR BENEFICIAL WATER USE PERMIT )  
NO. 6576-s76H, BY MARTIN G. AND ) PROPOSAL FOR DECISION  
RANNEY H. MOSS

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Pursuant to the Montana Water Use Act, and to the Montana Administrative Procedures Act, after due notice, a hearing on objections to the above-described Application was held in the City Council Chambers, Missoula City Hall, 201 West Spruce, Missoula, Montana, at approximately 9:00 a.m. on Friday, June 11, 1976, Donald D. MacIntyre, Hearing Examiner, presiding.

Ranney H. Moss appeared on behalf of the Application and presented testimony.

Mr. Henry A. Blastic, Jr., and Mr. Keith R. Swinger, appeared in support of their objections to the Application. Mr. Gail L. Owen appeared on behalf of his parents, Lloyd and Margaret Owen, Objectors to the Application. Diane Hellander and John Bruer appeared and objected to the Application, though they did not submit written objections prior to the hearing. Mr. Jim Rehbein appeared on behalf of the Department of Natural Resources and Conservation.



### MOTIONS

At the hearing Mrs. Moss explained that their request for 5.5 acre-feet per annum was the result of advice given them, and that if in the Department's discretion a lesser amount would be sufficient, they would be willing to accept that lesser amount. Since this motion results in a lower request of appropriation than originally applied for, the Applicant's motion was duly noted.

As required by law, the Hearing Examiner hereby makes the following Proposed Findings of Fact, Proposed Conclusions of Law, and Proposed Order to the Administrator, Water Resources Division, Department of Natural Resources and Conservation.

### PROPOSED FINDINGS OF FACT

1. On October 1, 1975, the Applicants, Martin G. and Ranney H. Moss, applied to the Department of Natural Resources and Conservation for Beneficial Water Use Permit No. 6576-s76H seeking to appropriate 10 gallons of water per minute, 1.5 acre-feet for domestic and 4 acre-feet for irrigation, for a total of 5.5 acre-feet per year from Buckhouse (Hayes) Creek, a tributary of the Bitterroot River, at a point in the N1/2 NE1/4 NW1/4 of Section 10, Township 12 N., Range 20 W., of the Montana Principal Meridian, in Missoula County, Montana, to be used for domestic purposes from May 1 to April 30, inclusive, of each year, and for new irrigation on a total of 1.3 acres, more or less, in said Section 10, from April 1 to October 30, inclusive, of each year. The Application stated that "diversion will be by

sinking a perforated culvert approximately 6 feet into the bank adjacent to the stream."

2. On April 8, 1976, the Department received the objection of Henry A. Blastic and Beth Blastic asking that the Application be denied because they felt that "the cumulative effect of these appropriations should be assessed before any new permits are granted." On April 5, 1976, the Department received the objection of Keith R. and Marie E. Swinger who asked that the Application be denied because "there are no unappropriated waters available for diversion." On March 24, 1976, the Department received the objection of Lloyd R. and Margaret Owen. They expressed concern because the application called for the use of water for domestic purposes. The other Objectors of record did not submit written objections.

3. At the hearing, Ranney H. Moss appeared on behalf of the Application and explained that although the Application called for irrigation of 1.3 acres, actually very little of the 1.3 acres could be used as lawn area. She said they plan on putting in a swimming pool and want to use Buckhouse water to fill it and that also it would be "handy" to have this appropriation if their proposed well ever went dry. She read into the record a letter of April 23, 1976, which she sent to the Department in response to the Objections which had been filed. They have owned their lot for two years and it has been her experience that there is always a "good flow of water" at their property. During cross-examination, she stated that they would drill a well prior to constructing their home on the lot.



4. Jim Rehbein testified that to irrigate all of the 1.3 acres in question it would require only about 2 to 2.5 acre-feet per year. Buckhouse Creek was adjudicated on June 9, 1884.

5. Mr. Gail Owen, representing his parents, introduced four exhibits. They were a copy of the Notice of the Owen water right, a citation to Worden vs. Alexander, a graph prepared by Mr. Owen which tended to show that due to heavy timber removal in the Buckhouse Creek area the flow of Buckhouse Creek will become more erratic, and an appendix to the Petty Mountain EIS. Mr. Owen felt that granting a permit from Buckhouse for domestic use would put prior appropriators in the position of "unhousing" the appropriators during low flows if they were to enforce their prior rights. He did not think the granting of a permit should put prior appropriators in a position to have to make that type of decision.

6. Mr. John Bruer, the apparent successor in interest to the largest decreed right to Buckhouse, stated that the high flow was generally during the end of May and the first part of June. Mr. Bruer irrigates 4-1/2 acres of hayland, 9 to 10 acres of pasture, a yard, and a vegetable garden. Mr. Bruer objected to the Application because he feels there are insufficient flows in Buckhouse to satisfy the request. He generally pumps 65 gallons per minute in his irrigating, and in late fall he has to wait overnight for his pond to refill.

7. Mr. Henry A. Blastic, Jr., objects to the Application because he feels a request of 5.5 acre-feet for 1.3 acres is too much and disagrees with the Applicant when she says that the creek always has a good flow.

8. Mr. Keith Swinger, an irrigator on Buckhouse for 20 years, objects to the Application also on the basis that there is insufficient flow to satisfy the requests. It is his experience that the high flow is in April and May, but that he has never seen the creek go completely dry.

9. Mrs. Diane Hellander, who has a 9.1-acre-foot-per annum Provisional Permit, objects to the Application because she feels the request may not be necessary. She felt that the Mosses could satisfy all their needs by the proposed well. Their well is about 230 feet deep and produces 50 gallons per minute.

10. Mrs. Moss, on rebuttal, asked the Department to amend their request for whatever amount was found to be sufficient and would be willing to accept the testimony of Mr. Rehbein as to the amount required to irrigate 1.3 acres.

From the foregoing Proposed Findings of Fact, the following Proposed Conclusions of Law are hereby made.

PROPOSED CONCLUSIONS OF LAW

1. Under the provisions of Section 89-880, R.C.M. 1947, a permit is required to appropriate water from Buckhouse (Hayes) Creek.



2. There are times when there exists unappropriated waters in the source of supply available for appropriation by the Applicant for the purpose of irrigating and filling a proposed swimming pool. The Department cannot issue a permit for the purpose of domestic use or to supplement for domestic use without adversely affecting the water rights of prior appropriators. Domestic use for the purpose of this Application is synonymous with household use.

3. Pursuant to 89-886(1), R.C.M. 1947, valid rights of prior appropriators must be protected in the issuance of a Beneficial Water Use Permit.

4. The rights of prior appropriators can be protected if the permit is conditioned to allow only the watering of the applicants' lawn and the filling of their proposed swimming pool.

5. Proper scheduling of lawn watering and filling of the swimming pool can ensure that the prior existing water rights of all Objectors will be protected.

6. The proposed means of diversion is adequate for the purpose of the Water Use Act, but nothing herein will be construed as a finding of adequacy under the Streambed Preservation Act.

7. The proposed use of water constitutes a beneficial use.

8. The proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

9. The Application for Beneficial Water Use Permit should be granted in accordance with the provisions of Chapter 8, Title 89, of the Revised Codes of Montana.

10. Nothing decided herein has bearing upon the status of water rights claimed by the Objectors except in relation to the right herein applied for, to the extent necessary to reach a conclusion herein.

Based upon the above Proposed Findings of Fact and Proposed Conclusions of Law, the following Proposed Order is hereby made:

PROPOSED ORDER

1. Subject to the conditions cited below, the Applicants' Provisional Permit No. 6576-s76H is hereby granted allowing for the appropriation of no more than 2.5 acre-feet of water per annum from Buckhouse (Hayes) Creek, a tributary of the Bitterroot River, at a point in the N1/2 NE1/4 NW1/4 of Section 10, Township 12 N., Range 20 W., of the Montana Principal Meridian, in Missoula County, Montana, to be used for irrigating a lawn and filling a proposed swimming pool from April 1 through October 31, inclusive, of each year, except that the filling of the proposed swimming pool shall be completed by June 1 of each year.

2. The Provisional Permit is granted subject to all prior water rights in the source of supply. The Applicant may not divert water when there is not sufficient supply to satisfy existing rights.



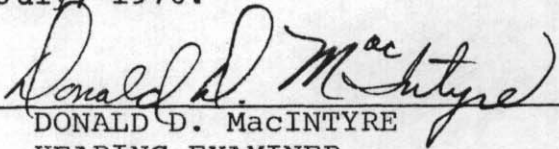
3. The issuing of a Provisional Permit by the Department in no way reduces the Applicants' liability for damage caused by the Applicants' exercise of its Provisional Permit, nor does the Department, in issuing a Provisional Permit, in any way acknowledge liability for damage caused by the Applicants' exercise of its Provisional Permit.

4. This Provisional Permit is granted subject to any final determination of prior existing water rights in the source of supply as provided for by Montana Law.

NOTICE

This is a Proposed Order and will not become final until accepted by the Administrator of the Water Resources Division of the Department of Natural Resources and Conservation. Written exceptions to the Proposed Order, if any, shall be filed with the Department within ten (10) days of service upon the parties herein. Upon receipt of any written exceptions, opportunity will be provided to file briefs and to make oral arguments before the Administrator of the Water Resources Division.

DATED this 23<sup>rd</sup> day of July, 1976.

  
DONALD D. MacINTYRE  
HEARING EXAMINER